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IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE,
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,
Petitioner,

v.

CITY OF CHICAGO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* VIOLENCE POLICY CENTER IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Exemption 7(C) of the Freedom of Information Act excuses the Bureau of Alcohol, Tobacco & Firearms ("ATF") from releasing gun tracing and multiple sales data that would meaningfully advance the public interest by shedding significant light on ATF's performance of its duties, despite the fact that ATF provides that same data to select members of the academic community for the purpose of assessing ATF's operations.

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INTEREST OF *AMICUS CURIAE*

Amicus the Violence Policy Center ("VPC") is a national nonprofit organization working to reduce firearms violence through research, education, and advocacy.[1] The Violence Policy Center is at the forefront of organizations working to reduce firearms violence in our nation. To this end, VPC analyzes a wide range of current firearms issues and provides information to policymakers, journalists, scholars, public health professionals, grassroots advocates, and members of the general public.

Since its founding in 1988, VPC has released more than 60 studies and books that have helped shape firearms legislation and policy on the federal, state, and local levels while increasing public understanding of firearms violence as a public health issue. Although VPC's work is primarily research oriented, VPC also has a Litigation Project, established in 2001, that has filed *amicus curiae* briefs in precedent-setting cases in the federal and state trial and appellate courts. As a result of its unique expertise, VPC is often relied on and cited by national news outlets and other organizations. Its staff members, who include lawyers and health policy analysts, are nationally recognized experts on firearms violence, manufacture, and litigation, as well as federal firearms law and the agencies empowered to enforce such laws such as the United States Department of Justice and the Bureau of Alcohol, Tobacco and Firearms ("ATF"). VPC has often made requests for data, including trace data such as those at issue in this litigation, for use in analyzing ATF's performance of its

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[1] No person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

statutory functions, as well as the effectiveness of federal firearms policy as a general matter.[2]

Amicus respectfully submits this brief in support of Respondent City of Chicago, urging affirmance of the decision of the Court of Appeals with respect to the exemption set forth in 5 U.S.C. § 552(b)(7)(C).

STATEMENT OF THE CASE

The Freedom of Information Act ("FOIA") generally requires disclosure upon request of records held by an agency of the federal government. Section 7(C) of FOIA, however, creates a narrow exemption from disclosure for "records or information compiled for law enforcement purposes, . . . to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) ("Exemption 7(C)").

The Exemption 7(C) dispute in this case centers on ATF's refusal – even after the point at which the agency has concluded that any law enforcement interest in the data has expired – to disclose four general categories of information. Three of the categories relate to information contained in the agency's Trace database, which holds information collected when a law enforcement agency requests a trace on a particular firearm in connection with a criminal investigation: (1) Recovery Location data, containing the address where the gun that was at some point involved in a crime ("crime gun") was recovered;

[2] One example of VPC's use of ATF data is VPC's groundbreaking 1992 study of felons whose privileges to possess firearms were restored. *See* VPC, *Putting Guns Back Into Criminals' Hands: 100 Case Studies of Felons Granted Relief From Disability Under Federal Firearms Laws* (1992). That study led to the annual appropriations measures prohibiting the use of funds for the purpose of restoring any felon's opportunity to possess a firearm that this Court unanimously upheld in *United States v. Bean*, 123 S. Ct. 584 (2002).

(2) Purchaser Identification data, containing the name and address of the first retail purchaser of the gun that later became a crime gun; and (3) Possessor and Associates data, containing the name and address of the person who possessed a crime gun at the time the gun first came into police custody (and the name and address of anyone with the possessor at that time). The fourth category of information is purchaser information from the Multiple Sales database, which contains the name and address of any person who purchased two or more handguns from the same source in any five consecutive business days.

Each of the disputed categories of data consists of multiple data fields. The Recovery Location category, for example, comprises seven data fields: Route Number, Apartment Number, Street Number, Street Direction, Street Name, Street Suffix, and Zip Code. *See* Pet. App. 52a & n.5. The other categories are similarly segregated. *See* Pet. App. 53a & n.6, 58a & n.9.

In the Court of Appeals, with respect to Exemption 7(C) ATF contended (as it does here) that there is no cognizable public interest in disclosing the withheld information.[3] The Court of Appeals rejected that contention, holding that the withheld data furthers "the public's interest in ATF's

[3] This *amicus* brief addresses solely ATF's invocation of Exemption 7(C), and does not address ATF's invocation of Exemption 7(A), the so-called "law enforcement exemption" contained in 5 U.S.C. § 552(b)(7)(A). *Amicus* emphasizes, however, that ATF has invoked Exemption 7(A) to justify only a limited period of data withholding – two years for the data contained in the Multiple Sales database and five years for the information contained in the Trace database – whereas it has invoked Exemption 7(C) to justify withholding certain data permanently. Because ATF has invoked Exemption 7(C) to justify withholding certain data even when (ATF concedes) Exemption 7(A) no longer applies, the Court must address Exemption 7(C) regardless of how it resolves the dispute regarding Exemption 7(A).

performance of its statutory duties of tracking, investigating and prosecuting illegal gun trafficking, as well as determining whether stricter regulation of firearms is necessary." Pet. App. 14a-15a. The Court of Appeals also held that this substantial public interest outweighs any privacy interest in the withheld data.

SUMMARY OF ARGUMENT

ATF contends that Exemption 7(C) justifies the non-disclosure of critical firearms information in ATF's possession, even when Exemption 7(A) is no longer applicable and there is no longer the potential for interference with any law enforcement activities. The linchpin of ATF's 7(C) argument is that release of information contained in its Trace database and its Multiple Sales database would not "meaningfully advance the public interest in evaluating ATF's conduct." ATF Br. at 28. But there is no question that release of the particular data fields at issue in this case would meaningfully advance the public interest that FOIA protects. Outside analysts who have been granted access to the databases are using these fields to monitor ATF's activities, assess the effectiveness of ATF's efforts to accomplish its statutory mandates, and identify with specificity the ways in which those efforts are lacking and could be improved. Data as to identity and location of purchasers and possessors of guns used in crimes, for example, is critical to understanding firearms trafficking, to determining how criminals react to current firearms regulations and enforcement efforts, and to evaluating and refining existing enforcement strategies and developing new ones.

Indeed, ATF's own action in putting the disputed data into the hands of outside analysts is a conclusive refutation of its litigation position regarding Exemption 7(C). ATF has created an "information oligopoly," releasing the Trace database and the Multiple Sales database – including the data fields here in

dispute – to a select group of researchers and academics who are chosen by the agency in order to evaluate and critique ATF's handling of its statutory firearms responsibilities (and who are themselves forbidden to disclose the raw data to other members of the public). The reports generated by these chosen few in turn have a substantial impact on how ATF elects to perform its statutory duties and on how the government elects to regulate both ATF and firearms activity more generally. Accordingly, notwithstanding ATF's protestations here, the agency has consistently recognized the substantial public interest in release of the Trace and Multiple Sales databases.

ATF's position, then, cannot plausibly be that the disputed data "do not meaningfully advance the public interest," but rather must be something quite different – that ATF itself has the sole discretion to determine which members of the public should have access to that data, on what terms, and for which specific analyses. But the notion that the agency alone should determine who (if anyone) should have access to data that is necessary to understand and evaluate agency conduct is precisely the notion that Congress *rejected* in FOIA. FOIA reflects Congress's judgment that the public – not the agency or its hand-picked researchers – is in the best position to engage in the full and searching scrutiny of agency conduct that is critical to the success of a representative government. ATF's analysis of the public interest at stake here simply cannot be reconciled with FOIA.

The agency's analysis of the privacy interests at stake is similarly incomplete. Much of the withheld data, including street name, street direction, and zip code, would illuminate "what [the] government is up to," *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (internal quotation marks omitted), without raising any privacy concerns at all. Even information that is

arguably more sensitive – individuals' names and their street or apartment numbers – should be disclosed given the powerful public interest in the information and the reduced privacy interest of those who purchase firearms knowing that their transactions are subject to substantial reporting requirements and other regulation. But even if the Court believes that the privacy interest in the names or particularized addresses of firearms purchasers and possessors is substantial, all of the relevant public interests and privacy interests can be fully accommodated by simply releasing coded information.

ATF's decision to withhold the disputed fields pursuant to Exemption 7(C) thus should not be upheld, and the decision of the Seventh Circuit on this issue should be affirmed.

ARGUMENT

ATF's effort to withhold *permanently* all of the disputed data pursuant to Exemption 7(C) is antithetical to the strong policy of disclosure that Congress set forth in FOIA. The agency's own actions make clear what is in any event beyond dispute: there is a substantial public interest in disclosure of the withheld data, because that data will shed considerable light on ATF's performance of its statutory duties (as well as on the performance of other components of the federal government in adequately addressing firearms issues).

Moreover, the privacy interests at stake cannot justify non-disclosure. With respect to some data fields, such as street name and zip code, those interests are *de minimis*, and there is no justification whatever for the agency's continued withholding. With respect to other fields, such as the name of the retail purchaser and the possessor, any privacy interests are outweighed by the substantial public interest and, in any event, can be easily accommodated through the use of coding.

Exemption 7(C) therefore does not shield the disputed data from public disclosure.

I. ATF's Effort to Withhold the Disputed Data Is Inconsistent with Congress's Judgment, Reflected in FOIA, That Disclosure of Information in the Possession of the Federal Government Is the Best Way to Ensure Governmental Accountability.

As ATF explains, the public interest advanced by FOIA is disclosure of information that "would she[d] light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *United States Dep't of Defense v. FLRA*, 510 U.S. 487, 497 (1994) (alteration in original) (internal quotation marks omitted); *see also United States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-75 (1989) (stating that the "core purpose of the FOIA" is contributing "significantly to public understanding of the operations or activities of the government" and "ensur[ing] that the Government's activities be opened to the sharp eye of public scrutiny" (internal quotation marks omitted)); ATF Br. at 28 (stating that the relevant public interest is in "evaluating the conduct of the federal government").[4] FOIA protects this public interest in order "to ensure an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also id.* (noting the need to "check against corruption and hold the governors accountable to the

[4] The public interest relevant to Exemption 7(C)'s balancing test includes the interest in monitoring not only the agency that possesses the data at issue, but also other agencies and even Congress. *See, e.g., Reporters Comm.*, 489 U.S. at 773 (discussing whether information requested would "shed any light on the conduct of any Government agency or official"); *id.* at 774 (inquiring whether information requested would reveal anything "about the character of [a] Congressman's behavior"); *FLRA*, 510 U.S. at 495-96.

governed"); *Reporters Comm.*, 489 U.S. at 772-73 (explaining that a "democracy cannot function" unless the people have a right to disclosure of government information (internal quotation marks omitted)).

ATF attempts to undercut these basic FOIA principles in at least two ways. First, ATF focuses its public interest analysis tightly on the City of Chicago's specific interest in using the information at issue in advancing its lawsuit, and pretends that no other public interest can possibly be at stake here. *See* ATF Br. at 28-29, 31. But "the identity of the requesting party has no bearing on the merits of his or her FOIA request," *Reporters Comm.*, 489 U.S. at 771, and there are many members of the public with a strong interest in using the withheld data to "shed light on" the performance of ATF in particular, and the federal government in general, with respect to gun policy and gun violence. The role of journalists, academics, researchers, activists, policy analysts, gun control advocates, gun control opponents, and other members of the public in monitoring and evaluating the federal government's conduct in this area – which, as explained below, will be directly and powerfully furthered by release of the specific data fields that ATF is withholding pursuant to Exemption 7(C) – cannot be overlooked or discounted.

Second, ATF suggests that this Court should adopt a categorical rule that "unless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the names of private individuals appearing in the agency's law enforcement files is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental public interest in such information would ever be significant." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991); *see also* ATF Br. at 32-33. But such a cramped view of the public interest should be

quickly rejected, because ferreting out illegalities is only a small subset of the larger public interest in monitoring and assessing the government's conduct. Indeed, this Court has previously noted with approval the broader public interest urged in this case, stating that "matters of substantive law enforcement policy . . . are properly the subject of public concern." *Reporters Comm.*, 489 U.S. at 766 n.18. Moreover, ATF's construction of FOIA would radically alter the balance that Congress struck in favor of disclosure. *See, e.g., Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (Congress made "disclosure, not secrecy, . . . the dominant objective" of FOIA); *see also United States Dep't of Justice v. Landano*, 508 U.S. 165, 177, 179, 181 (1993) (noting the Court's "obligation to construe FOIA exemptions narrowly in favor of disclosure," and rejecting a categorical rule that was based on an unreasonably broad inference and was "in practice all but irrebuttable"). The agency's efforts to expand the scope of Exemption 7(C) thus cannot be squared with this Court's FOIA jurisprudence.[5]

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[5] Indeed, notwithstanding ATF's characterization in its brief of D.C. Circuit law on this point, the D.C. Circuit itself seems to have backed away from its *SafeCard* dicta, stating in several later decisions that "*when . . . governmental misconduct is alleged as the justification for disclosure*, the public interest is insubstantial unless the requester puts forward compelling evidence [of] . . . illegal activity." *Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1282 (D.C. Cir. 1992) (internal quotation marks omitted); *see also, e.g., Spirko v. United States Postal Serv.*, 147 F.3d 992, 998 (D.C. Cir. 1998). Here, demonstrating governmental "misconduct" is not the principal public interest asserted.

II. Release of the Disputed Data Contained in the Trace and Multiple Sales Databases Will Serve the Public Interest by Allowing the Public to Understand, Monitor, and Assess ATF's Performance of its Statutory Duties.

Once ATF's overly narrow view of the public interest at stake in FOIA is set aside, it becomes clear that the withheld data in the Trace and Multiple Sales databases must be released, because the release will directly advance the public interest in evaluating ATF's performance of its core statutory functions.

1. In order to understand the degree to which disclosure of the disputed data would disclose what the government is "up to," it is first necessary to understand the scope of ATF's duties. ATF's mission is to "enforce[] the Federal laws and regulations relating to . . . firearms." ATF Snapshot, *available at* http://www.atf.treas.gov/about/snapshot.htm. Among other things, ATF "is responsible for enforcing the Gun Control Act of 1968," which "regulates the manufacture, importation, distribution, and sale of firearms, and . . . contains criminal provisions related to the illegal possession, use, or sale of firearms." Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms, *Firearms Commerce in the United States* 1 (2001/2002). "In enacting the Gun Control Act of 1968, Congress declared that its purpose was to keep firearms out of the hands of those not legally entitled to possess them, and to assist Federal, State and local law enforcement officials in their efforts to reduce crime and violence." Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms, *Commerce in Firearms in the United States* 3 (Feb. 2000).[6]

[6] In addition to the Gun Control Act, ATF enforces the National Firearms Act; the Brady Handgun Violence Prevention Act; the Violent Crime Control and Law Enforcement Act of 1994; the Organized Crime Control Act of 1970; the Anti-Arson Act of 1982; the Church Arson Prevention Act of 1996; and the Antiterrorism and Effective Death Penalty Act of 1996. *See* Dep't of the Treasury, *ATF Accountability Report 2001*, at 15 (Feb. 2002). On January 24, 2003, ATF officially moved from the Department of Treasury to the Department of Justice. *See* Press Release, Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *ATF Moves to the Department of Justice* (Jan. 24, 2003), *available at* http://www.atf.treas.gov/press/fy03press/012403atfdoj.htm.

In seeking to implement its statutory responsibility, ATF "work[s] directly and in cooperation with others" to "[s]uppress and prevent crime and violence through enforcement, regulation, and community outreach"; to "[s]upport and assist federal, state, local, and international law enforcement"; and to provide "innovative training programs in support of criminal and regulatory enforcement functions." *See* About ATF, *available at* http://www.atf.treas.gov/about/mission.htm; *see also* ATF Snapshot, *available at* http://www.atf.treas.gov/about/snapshot.htm.

2. In light of ATF's purposes, it is clear from even a cursory examination of the data fields at issue that the data are important to the public's understanding and full evaluation of ATF's activities. This conclusion is strongly reinforced by review of the existing academic literature resulting from ATF's release to a small group of researchers of the very databases and data fields at issue under Exemption 7(C) in this litigation. These researchers, under various ATF-imposed restrictions, have drawn some interesting conclusions – but release of the data under FOIA would, as Congress intended, more fully illuminate the agency's conduct, and thereby advance the FOIA-protected public interest.

Each of the various disputed categories of information must be examined in some detail, and each serves the public interest in knowing what the government is "up to" in its own particular way. Nevertheless, there are three overarching

connections to the public interest that all of the categories have in common. First, the data that ATF has chosen to withhold pursuant to Exemption 7(C) facilitate direct measurement of the implementation of ATF's chosen policy initiatives, and assessment of whether those initiatives have had their intended impact. Second, the data help to evaluate the efficacy of the vast array of experimentation that occurs at the state and local level. Although this is important in its own right, what is most relevant for FOIA purposes is that such evaluations directly advance the public's understanding of ATF's success in performing its duty to identify and support promising state and local initiatives, as well as in developing independent federal efforts to reduce violent crime. Third, the data pinpoint new initiatives for ATF to implement itself or fund at a state or local level, which is an important part of ATF's purpose. *See* Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms, *ATF 2000-2005 Strategic Plan*, at 5 (Sept. 2000) (ATF "will continue to pursue innovative solutions and technology to increase our efficiency and effectiveness and that of our partners").

Recovery Location Data. Recovery location data provide highly significant information about the flow of guns from the time between their first retail purchase and their use in a crime. For example, these data make it possible to determine whether crime guns are local or the product of interstate (legal or illegal) trafficking. *See, e.g.*, Garen J. Wintemute, *Where the Guns Come From: The Gun Industry and Gun Commerce*, 12 The Future of Children 55, 64 (2002) (53% of guns recovered from persons under the age of 18 were first sold in-State; 30% were sold in the county of recovery or an immediately adjoining county); Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 Ariz. L. Rev. 277, 298-99 (2001) (concluding that 62% of crime handguns recovered from

youths were first purchased from licensed dealers in-State). Such data also allow documentation of interstate trafficking pathways, enabling the data recipient not only to track the movement of such guns, but also to observe the characteristics of the source and destination States. *See* Wintemute, *Where the Guns Come From* at 64 (noting the "Iron Pipeline" that transports guns from the Southeast for resale in the middle Atlantic States and New England, and a second pathway that brings guns from the Central South to the Upper Midwest, particularly Chicago); *see also* Cook & Braga, 43 Ariz. L. Rev. at 299 n.107 (noting that many firearms originated from "southern states with less restrictive legislation such as Virginia, North Carolina, Georgia, and Florida").

The more detailed the recovery location data, the more refined the potential analyses. Detailed information and analysis – whether guns used in a particular neighborhood are coming from in-State or from certain other States, from a few particular dealers or from a wide variety of places, from initial purchases or from resale or theft – can help the public understand whether ATF is implementing or supporting violence-reduction strategies that are likely to be effective. Information regarding recovery location is likely to be particularly important in light of the numerous studies that have suggested that so-called "hot-spot policing" – in which police focus their efforts on "crime clusters" within neighborhoods – can be effective in reducing gun violence. *See, e.g.*, Anthony A. Braga, *Part II: Research Findings From Prevention and Intervention Studies: The Effects of Hot Spots Policing on Crime*, 578 Annals of the Am. Acad. of Pol. & Soc. Sci. 104 (2001); Lawrence W. Sherman *et al.*, *Preventing Crime: What Works, What Doesn't, What's Promising*, at ix-x (1997); Lawrence W. Sherman, James W. Shaw & Dennis P. Rogan, Dep't of Justice, *The Kansas City Gun Experiment* 1-2 (Jan. 1995), *available at* http://www.ncjrs.org/pdffiles/kang.pdf.

Information about recovery location also makes possible a detailed assessment of the implementation and the impact of gun legislation. For example, as originally passed, the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. §§ 922(q)-(t)), required licensed firearm dealers to conduct a background check on all handgun buyers and resulted in a delay of up to five business days before the transaction could be consummated. *See generally Printz v. United States*, 521 U.S. 898, 902-03 (1997). Because at the time the initial Brady Act took effect many States already had in place requirements that met or exceeded those imposed by the Act, the Act imposed new requirements on only certain States. Researchers using trace location data were able to examine the impact of the Brady Act on the source of guns. They found that the effect of implementation of the Act was "immediate and large"; the percentage of guns in Chicago (the test jurisdiction) that came from out of State fell from roughly 50% to 32%, with virtually all of the decrease attributable to States that were affected by the Act's new requirements. *See* Cook & Braga, 43 Ariz. L. Rev. at 302-07.

By comparing the percentage of in-State guns across States with different licensing and registration requirements, researchers with access to Recovery Location data may also be able to assess the federal government's conduct by examining whether and how such local licensing and registration requirements affect interstate gun trafficking. Such analysis can provide insight into "the potential effectiveness of supply-side enforcement." Anthony A. Braga *et al.*, *Illegal Supply of Firearms*, 2002 Crime & Just. 317, 338. That in turn allows policymakers to evaluate and debate whether ATF's actions – its enforcement efforts and its support of state and local authorities, for instance – are adequate and consistent with what the data suggest.

In addition, recovery location information contained in trace data can be used to evaluate current federal policy on limiting gun sales. For instance, in 1993, Virginia implemented a law that limited handgun purchases for any person to one per month. Using firearms trace data, researchers were able to ascertain that the law had a substantial effect on trafficking of Virginia firearms into the Northeast, reducing the percentage of guns in the Northeast corridor that originated in Virginia from 35% before the law took effect to 16% after the law took effect. *See* Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 JAMA 1759, 1760 (1996). This led researchers to conclude that legislation such as the Virginia law "is an effective means of disrupting the illegal interstate transfer of firearms," *id.* at 1761, and thus to identify an area in which federal support or a change in federal policy might be appropriate.

For these reasons, there is little dispute that allowing the public to have access to Recovery Location data, and thus to understand trafficking at a sophisticated level, is essential to an informed public comprehension and assessment of the approaches chosen by the government to combat gun violence. *See* Cook & Braga, 43 Ariz. L. Rev. at 278 (trace data is useful for "providing a basis for evaluating the effects of changes in gun-control laws"). Examining the changes in the flow of guns in response to ATF or congressional policy allows the public to evaluate the wisdom of the federal government's policy changes.

Purchaser Identification Data. Studies of the Purchaser Identification data in the Trace database and the Multiple Sales database provide critical insight into how guns get from licensed dealers into the hands of criminals. For example, studies linking Purchaser Identification data to Possessor and

Associates data reveal that a relatively small percentage of crime guns are in the hands of the first retail purchaser at the time of recovery. *See* Wintemute, *Where the Guns Come From* at 63 (noting that, in 1999, only 11% of recovered crime guns were possessed by the people who had first purchased them from a licensed gun retailer). Such information has important implications regarding the appropriate level of regulation for the (less regulated) secondary market, and provide a basis to assess ATF's actions (or inactions) in that area.

Another critical result of study of Purchaser Identification data is understanding of the role of "straw purchasers" in making firearms purchases from licensed dealers. Studies of the trace data indicate that "[a] small number of persons were identified as frequent first purchasers of guns recovered in crimes, sometimes over large regions." *Hearing on H.R. 4051, the "Project Exile: The Safe Streets and Neighborhoods Act of 2000," Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong. (2000) (statement of Dr. Garen Wintemute), *available at* http://www.house.gov/judiciary/wint0406.htm; *see also* Cook & Braga, 43 Ariz. L. Rev. at 294 (concluding from analysis of trace data that "a substantial portion (albeit a minority) of the guns that end up in crime are first purchased from [a licensed dealer] by a 'straw purchaser' – someone who intended to resell them to a trafficker (illicit dealer) or to a proscribed individual"). These studies suggest that strategies that target the ability of straw purchasers to make such purchases – such as concentrated enforcement activities and one-gun-a-month laws – could have important effects on the trafficking of illegal weapons. Release of Purchaser Information data under FOIA would allow the public to monitor ATF activity in this area and to test that hypothesis for itself.

Possessor and Associates Data. Possessor identification data are tremendously powerful. As noted, when linked with Purchaser Identification data, Possessor and Associates data provide crucial information about whether the user of a crime gun is likely to have purchased that gun from a licensed dealer, or instead to have acquired it in the secondary market or by theft. In addition, by giving the data recipient the ability to link up with other databases, the Possessor and Associates data provide an opportunity to expand the understanding of gun violence exponentially. Researchers can take advantage of more detailed information gathered by States; California, for example, has detailed databases regarding retail gun purchases that can be usefully employed in conjunction with ATF's Trace and Multiple Sales databases to provide a fuller picture of the federal government's conduct with respect to gun trafficking. Yet another example of a useful linkage involves the National Violent Death Reporting System, a database being developed by the Centers for Disease Control and Prevention, in conjunction with Harvard researchers, that will contain more than 100 pieces of information about each violent death occurring in New Jersey, Massachusetts, and a number of other States. *See* David Tuller, *Combining the Scattered Data From Violent Deaths*, N.Y. Times, Jan. 14, 2003, at D7.

These examples, of course, merely scratch the surface of the public benefits that would result from ATF's release of information that would permit trace and multiple sales data to be linked to other detailed databases. That linkage would allow an increasingly sophisticated understanding of violent crime, and a correspondingly sophisticated understanding of ATF's efforts pursuant to its statutory mandate to reduce that crime.[7]

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[7] *Amicus* has previously used analogous identification data to alter the way ATF enforced the gun laws. Under 18 U.S.C. § 925(c), a convicted felon could apply to the Secretary of the Treasury to restore the ability to

3. It is critical to note, moreover, that none of this discussion will come as a surprise to ATF, because ATF *already* uses the contested data for precisely these purposes, while carefully picking and choosing who outside the agency will be permitted access to the data. On its own or in conjunction with funding operations such as the Justice Department's National Institute for Justice, ATF releases the data to selected academics to perform pre-approved analyses (while at the same time restricting those academics from disclosing the data to other members of the public). Underlying this limited release, of course, is the agency's recognition that the withheld databases can be used to develop a better understanding of the markets – both legal and illegal – for firearms, and that only with a full understanding of the functioning of the firearms market is it possible to evaluate the implementation and the success and failure (as well as the reasons for each) of the crime reduction strategies that ATF adopts and supports. *See* Wintemute, *Where the Guns Come From* at 64 ("As the intersection between gun markets and crime has become better understood, violence prevention practitioners at the federal, state, and local levels . . . have worked to develop new strategies for combating the gun violence epidemic."); Cook & Braga, 43 Ariz. L. Rev. at 278 (tracing data is useful for "informing strategic planning efforts to interdict the transactions by which criminals tend to

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possess a firearm. *See generally United States v. Bean*, *supra*. Using ATF data containing names and other identification, and following up with publicly available court records, VPC discovered that ATF had restored the firearms privileges of thousands of felons whose crimes included sexual assault, drug dealing, terrorism, homicide, and armed robbery. In May 1992, VPC released a landmark report, entitled *Putting Guns Back Into Criminals' Hands: 100 Case Studies of Felons Granted Relief from Disability Under Federal Firearms Laws*, that detailed its investigation of the § 925(c) "relief" program. As a result of this report, Congress defunded the § 925(c) "relief" program, expressly eliminating the previous broad discretionary authority granted to the Secretary to grant this "relief."

acquire their guns"); *see also* Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms, *Youth Crime Gun Interdiction Initiative, Crime Gun Trace Reports 2000: National Report* 1-4 (July 2002); *cf.* ATF Br. at 30 n.14 (admitting that ATF's crime gun trace reports "shed light on a wide range of ATF programs"). ATF plainly understands that trace data in general and the disputed data fields in particular occupy "a unique niche in policy evaluation, providing a basis for exploring the effects of supply oriented interventions on the types and sources of guns used in crime." Cook & Braga, 43 Ariz. L. Rev. at 308.

With ATF's blessing, then, the small number of researchers to whom the agency has already released the trace and multiple sales data that it is withholding in this case have used the data to assess ATF enforcement efforts, to evaluate local strategies, and to identify promising strategies for future testing. *See generally* Braga *et al.*, 2002 Crime & Just. at 330 (noting that ATF and outside researchers have used firearms trace data "to gain insights on the illegal supply of firearms since the early 1970s"); *see also e.g.*, Dep't of Justice, National Inst. of Justice, *Solicitation for a Demonstration/Evaluation of the Utility of ATF's Youth Crime Gun Interdiction Initiative Fiscal Year 2001*, at 3 (Mar. 2001) (describing an NIJ/ATF agreement to support a "collaboration to evaluate the effectiveness of ATF's [Youth Crime Gun Interdiction Initiative] program as a source of information on which to base the design of supply-side strategies to intervene in the illegal firearms market in one target city"); David M. Kennedy, Anne M. Piehl & Anthony A. Braga, *Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and a Use-Reduction Strategy*, 59 Law & Contemp. Probs. 147 (1996) (describing use of trace data to formulate innovative strategy to address Boston youth violence); Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms, *Commerce in Firearms in the*

United States 19 (Feb. 2000) (crime trace data is used "to detect in-state and interstate patterns in the sources and kinds of crime guns"); *id.* at 2 ("By following up on crime gun trace information and other trafficking indicators, ATF can determine the reasons for diversion of firearms from this relatively small proportion of dealers to the illegal market and take regulatory and criminal enforcement actions that will curb this illegal flow of guns."); Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms, *Youth Crime Gun Interdiction Initiative, Crime Gun Trace Reports 2000: National Report* at 1-4 (discussing purposes of crime gun tracing); Dep't of the Treasury, *ATF Accountability Report 2001* at 17 (major goal of ATF initiative is "to provide crime gun market analyses to break the chain of illegal supply of firearms to youths"); *id.* at 18 (ATF's Crime Gun Analysis Branch "uses crime gun data amassed by the [National Tracing Center] to identify illegal firearms trafficking patterns and trends"); Cook & Braga, 43 Ariz. L. Rev. at 277 n.1 (noting the authors' access to trace data).

In light of its selective release of the data at issue, ATF's position cannot plausibly be that the withheld information does not advance the public interest by shedding light on ATF's performance of its statutory duties. Rather, ATF seeks a decision from this Court that allows the agency to choose who – if anyone – shines the light. But FOIA rejects that scenario. Congress was well aware of the "[i]nnumerable times" that agencies had withheld information under prior law "only to cover up embarrassing mistakes or irregularities," S. Rep. No. 89-813, at 3 (1965), and chose to write a statute that opened government files to the public at large and made "disclosure, not secrecy, . . . the dominant objective," *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976).

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Because ATF and the outside researchers with whom ATF chooses to share the withheld data rely upon that data to analyze and evaluate ATF's performance of its statutory mandates, there is little doubt that dissemination of this information to the public would advance directly the public interest that Congress recognized in FOIA. That is not to say that the public will dictate the strategy that ATF must adopt or otherwise have the final say on gun policy. But that is to say that the withheld data plainly enable the public to better understand and monitor ATF's activities and to conduct a more nuanced and informed assessment of ATF's performance. FOIA's public interest standard requires no more.

III. The Substantial Public Interest in Disclosure Outweighs Any Privacy Interests Implicated by the Trace and Multiple Sales Databases and, in Any Event, the Withheld Data Can Be Segregated and Coded.

In addition to understating the substantial public interest in disclosure of the data, ATF's brief substantially overstates the privacy interests at stake.[8] In considering the significance of

[8] ATF (supported by its *amicus* the National Rifle Association ("NRA")) suggests that 18 U.S.C. § 923(g)(3)(B) – which bars the release of multiple sales data by state and local governments – somehow bars release here of multiple sales data by the federal government. *See* ATF Br. at 24 (arguing that § 923(g)(3) demonstrates "that Congress did not contemplate release of those records to anyone – much less to the general public – in circumstances where ATF perceives no law enforcement interest in their disclosure"). That suggestion is meritless. Section 923(g)(3)(B) simply reflects Congress's judgment that, with respect to the Multiple Sales database, the balancing of the public interest and any privacy interests should occur in the context of FOIA, which reflects federal disclosure polices, rather than be left to the vagaries of state and local disclosure policies. But Congress's decision that FOIA balancing should apply cannot be read as a decision regarding which way the scale should tip.

these interests, three overarching concerns should inform the analysis.

First, ATF's ban on release of the data is *permanent*, and applies long after any law enforcement interests are arguably implicated. Under ATF's analysis, the privacy interests with respect to data on firearms purchases simply never grow stale.

Second, ATF does not give sufficient weight to the fact that purchasers of firearms understand that they are buying lethal products, the sale of which is subject to extensive reporting requirements and other regulation. Purchasers know, for example, that records of gun purchases from licensed firearms dealers are routinely turned over to federal, state, and local authorities. Though ATF may well be correct that disclosure to the government does not eliminate entirely the privacy interests at stake, the extensive regulation of firearms purchases plainly reduces purchasers' expectation of privacy.

Third, the data are already subject to substantial disclosure even outside the context of law enforcement. As noted above, ATF releases the information contained in the Trace and Multiple Sales databases to academics, researchers, and others of the Bureau's choosing. Indeed, the Bureau released the full data set for the City of Chicago to respondent in this case. Even acknowledging that selected release is not identical to the full public release contemplated by FOIA, it is plain that the privacy concerns implicated here are not absolute. Against this backdrop, ATF's plea for protection of privacy is plainly

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The NRA further suggests that § 923(g)(1)(D) somehow limits disclosure. This suggestion is meritless, and even ATF does not advance it. Section 923(g)(1)(D) allows limited release of data to law enforcement agencies *without any FOIA balancing*. A statute permitting release of information without any protection of privacy interests surely provides no support for the proposition that release is somehow precluded after due assessment of the relevant privacy interests.

inadequate to justify ATF's restrictive balancing of the interests at stake.

In any event, ATF's brief inappropriately treats all of the data fields as a single undifferentiated unit. *See, e.g.*, ATF Br. at 32. But as noted above, the withheld information consists of several discrete, segregable data fields implicating varying levels of concern. *See* 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."). With respect to the data fields regarding zip code, street, and street direction, for example, ATF fails to articulate any privacy interest at all. Nor could it; those fields, which contain useful information that advances the public interest underpinning FOIA, consist solely of information that is insufficiently specific to tie to particular individuals, and thus must plainly be disclosed.

With respect to the data fields for which the privacy arguments are somewhat stronger – principally name and street and apartment number – privacy considerations cannot justify non-disclosure because, for the reasons explained above, the public interest in receipt of these data fields is so powerful. But even if the Court were to conclude otherwise with respect to one or more of these fields, there is little dispute that *all* of the relevant privacy interests can be protected by releasing coded versions of the data. Such coding could limit to some degree the public benefits to be obtained from disclosure – for instance, it would prevent members of the public from putting the data together with information available in other databases to obtain a fuller picture of the government's performance. But coded data would be virtually equivalent to non-coded data in virtually every other respect – in assessing whether ATF is concentrating resources on the "straw purchaser" problem, whether ATF's actions are affecting the existence of crime "hot

spots," whether increased regulation of the secondary firearms market might be appropriate because the purchaser and possessor are different (coded) individuals, and so on. In short, release of coded information as to certain data fields would still advance the public interest that FOIA protects, and it would do so without any intrusion on privacy whatsoever.

Such coding, which requires giving the computer on which the data is stored a simple set of instructions, does not amount to the creation of a new record. Rather, it is nothing more than a change in format – an electronic redaction process that is equivalent to, and much less labor-intensive than, simply striking through several of the letters in a gun purchaser's name with a black marker.

Indeed, this sort of format change is specifically contemplated by the 1996 amendments to FOIA, which were intended to acknowledge the increasing prevalence of electronic records and to preserve the public's right of access to such records. Under the amendments to 5 U.S.C. § 552(a)(3), "[i]n making any record available to a person under this paragraph, an agency shall provide the record in *any form or format* requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B) (emphasis added); *see also id.* § 552(a)(3)(C)-(D) (stating that, "[i]n responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format," including review of the records "manually or by automated means"); H.R. Rep. 104-795, at 21-22 (1996) ("Computer records found in a database rather than in a file cabinet may require the application of codes or some form of programming to retrieve the information. Under the definition of 'search' in the bill, the review of computerized records would not amount to the creation of records."), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3464-65. Coding of the data fields at issue in this case falls squarely within the scope of these provisions; it is a means for the agency to produce the records in a format that retains the links between data without releasing personal identifiers, and it requires only limited, reasonable programming.

Accordingly, ATF's conclusion that the privacy interests at stake justify blanket withholding of the disputed data fields cannot be sustained.

CONCLUSION

The decision of the Seventh Circuit regarding Exemption 7(C) should be affirmed.

Respectfully submitted,

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